



## BEFORE THE ARIZONA CORPORATION COMMISSION

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JEFF HATCH-MILLER  
Chairman  
WILLIAM A. MUNDELL  
Commissioner  
MARC SPITZER  
Commissioner  
MIKE GLEASON  
Commissioner  
KRISTIN K. MAYES  
Commissioner

2006 JUL 24 P 3: 55

AZ CORP COMMISSION  
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Arizona Corporation Commission

**DOCKETED**

JUL 24 2006

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IN THE MATTER OF THE APPLICATION	)	DOCKET NO. W-01157A-05-0706
OF WEST END WATER COMPANY FOR	)	
EXTENSION OF EXISTING CERTIFICATE	)	<b>RESPONSE TO STAFF</b>
OF CONVENIENCE AND NECESSITY	)	<b>REQUEST TO SUSPEND</b>
	)	<b>BRIEFING SCHEDULE AND RE-</b>
	)	<b>OPEN HEARING</b>
	)	

The City of Surprise ("the City" or "Surprise") files this Response to the July 21, 2006 Staff Request to Suspend Briefing Schedule and Re-Open Hearing. The City does not object to a suspension of the briefing schedule to accommodate any procedural steps precipitated by the July 14, 2006, request for service letter. However, the City of Surprise sees no reason, at this time, to reopen the hearing. The new request for service letter, from the current Walden Ranch developer, renders null and void (with respect to the extension area at issue in this application) the March 3, 2005 request for service letter from the prior owner submitted by West End Water Company ("the Company" or "West End"). Without a valid request for service letter for the requested extension area, West End's application is now insufficient. Because the application is insufficient, there is no

reason, at this time, to reopen the hearing. Instead, this matter should be stayed for a reasonable period to allow West End to submit either a valid request for water service or voluntarily withdraw its application. In the event West End Water Company does not withdraw its application, post-hearing briefing may facilitate resolution of this case.

## **I. Relevant Factual Background**

West End requests authorization to provide water service to a section of the Walden Ranch Development (“Walden Ranch” or “the Development”) currently located outside of its CC&N. Walden Ranch is within the City’s GPA, approximately a mile and a half from the current City boundary. Presently, the Walden Ranch property is uninhabited and it is anticipated that there will be no water service customers for at least two to three more years. (Tr. 46:2-6.) West End’s extension request is based solely on a request for service dated March 3, 2005, from Walden Farms, LLC, the former developer of the property. (Exhibits A-2, COS-2, and COS-3; Tr. 51:12-18; Tr. 52:5-56:10.)

During the evidentiary hearing in this matter, testimony was given that, on or about July 2005, the property in question became the subject of a sale agreement which, over a period of months, transferred Walden Ranch to a new developer, Woodside Walden, LLC (“Woodside Homes”). (Tr. 202:8-203:14; Tr. 25:20-26:1; Exhibit COS-2.) Just prior to the hearing, the City learned that Woodside Homes, like the prior Walden Ranch developer, desired annexation of Walden Ranch as soon as possible. (Tr. 205:2-10; COS-15.) The City also learned that Woodside Homes had not indicated a preference concerning the water service provider for the portion of the Development at issue in this Application. (Tr. 204:20-205:1.)

Given this evidence, and the dated nature of the March 3, 2005 request for service, the Administrative Law Judge ordered that she be provided an update on the status of the service request. (*See* Tr. at 313:14-315:19 (ordering “an update from the developer or owner of the land regarding the status of the request for service”); *id.* at 333:15-18 (ordering “an update . . . regarding the status of the request for service”).)

On July 18, 2006, the City provided this update when it filed a Notice that included as exhibits a letter from Woodside Homes formally requesting water service from the City and the City’s responding “will serve” letter. (Notice of Filing Updated Request for Service from Woodside Homes and City of Surprise Will Serve Letter, filed on July 14, 2006, (“Notice”) at Exhibits A and B.)<sup>1</sup> West End has not received a formal request for water services from Woodside Homes. (*See* Tr. 51:19-22.)

## **II. The Application Filed by West End Water Company Is Insufficient**

Commission Staff routinely require a request for service letter before a CC&N extension application will be deemed sufficient. (*See, e.g.*, A-9 at ¶8.) This is consistent with R14-2-402(C)(1) which requires a provider to include, in any request for extension of an existing CC&N, “the number of persons or entities proposed to be served by such service extension, their location in relation to the certificated area of the utility.” A current, up-to-date request for service is important because it demonstrates that there is actual need for water service and it documents the desires of the property owner. Absent

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<sup>1</sup> These letters have yet to be admitted in the record, however Surprise is filing a Motion to Admit (contemporaneously with this response), which is supported by the July 24, 2006 Affidavit of Richard Williams. In this affidavit, Mr. Williams attests to the authenticity of the letters. Further, it is Surprise’s understanding that neither West End nor Staff question the authenticity of the documents.

such a request (or when there is only an outdated request), the Commission has no guarantee that any necessity exists and runs the risk of taking action without fully considering the desires of all effected parties.

Here, West End's request for service letter is sixteen months old. Further, since the letter issued, the property has been sold to a new home builder. No evidence in the record suggests that the author of the original letter had authority to submit a request on behalf of the new developer. (*See* Tr. 202:8-203:14; Tr. 25:20-26:1.) On July 14, 2006, the new home builder, Woodside Homes, formally requested service from Surprise for the area at issue in this application. (*See* Notice at Exhibit A.) The City subsequently responded with the necessary will serve letter. (*See id.* at Exhibit B.) Given that the current owner of the requested area has requested water service from the City, not West End, West End's application should be deemed insufficient.

### **III. The Commission Has No Authority Evaluate the City's Commitment to Provide Service**

There should be no weighing of the relative merits of the two potential service providers in this case. The Constitution expressly grants Surprise the right to provide water services both inside and outside of its corporate limits. Const. art. II, § 34 (“[E]ach municipal corporation within the state of Arizona shall have the right to engage in industrial pursuits.”); Const. art. XIII, § 5 (“Every municipal corporation within this state shall have the right to engage in any business or enterprise which may be engaged in by a person, firm, or corporation by virtue of a franchise from said municipal corporation.”); *see City of Phoenix v. Kasun*, 54 Ariz. 470, 474, 97 P.2d 210, 212 (1939) (listing the

“rules governing municipal corporations,” which include “the right to furnish water . . . to customers without, as well as within, its corporate limits”).

Because the City is not a public service corporation, the Commission has no statutory authority to issue it a CC&N or, for that matter, constitutional authority to regulate its activities. Const. art. XV, § 2 (“All corporations *other than municipal* engaged in furnishing [public utility services] shall be deemed public service corporations.”) (emphasis added). “[N]o plainer language could have been used by the makers of the Constitution to state that the constitutional powers conferred upon the . . . Commission, in regard to the government and regulation of public utilities, were not intended to, and did not, include those owned and operated by municipal corporations of any character.” *Menderson v. City of Phoenix*, 51 Ariz. 280, 283, 76 P.2d 321, 322 (1983). “[T]he Constitution not only does not expressly authorize the . . . Commission to regulate municipal corporations . . . , by necessary implication, [it] forbids such regulation.” *Id.* Were the Commission to interfere with this constitutionally protected right, it would be exceeding its limited authority. *See generally City of Phoenix*, 52 Ariz. 277, 80 P.2d 390 (holding that the Commission exceeded its authority when it attempted to regulate a municipality-owned water system operating outside of the municipality’s corporate limits).

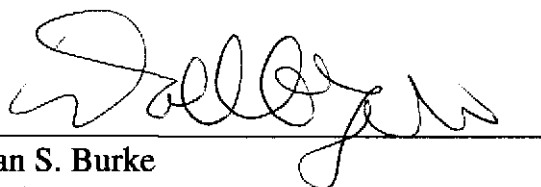
Proceeding, at this time, with further hearings in this case – where the City of Surprise has received a valid request for water service – would amount to unlawful interference with a municipality’s protected right to provide water service.

#### **IV. Conclusion**

The new request for service letter comes from the current Walden Ranch developer. West End's application to extend its CC&N lacks a valid request for service and, therefore, is insufficient. West End's application should be stayed for a reasonable period to allow West End to submit either a valid request for service or voluntarily withdraw its application. In the event that West End Water Company does not withdraw its application, and the Administrative Law Judge continues to believe post-hearing briefing would be helpful, the City remains willing to submit post-hearing briefs.

Dated this 24<sup>th</sup> day of July, 2006.

OSBORN MALEDON, P.A.

By 

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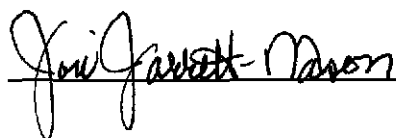
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